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TRIAL REPORT
SUMMARY/TESTIMONY/PROJECTION

CASE NAME: Cipollone DATE: 11-May-88 a.m.

SUMMARY:

Before the jury returned this morning, Sarokin announced that he was overruling Edell's objection and would permit defendants to introduce the companion question and answer about awareness from the 1954 Gallup poll without calling a polling expert to do so. Noting that it was technically hearsay, Sarokin indicated he would admit the poll into evidence out of fairness to the defendants since Edell had admitted a portion of the same poll.

Northrip concluded his direct examination of Dr. Barker by reviewing with him the time he has spent in preparation for his testimony in this case, his compensation, and his lack of involvement in related litigation. Edell then cross-examined the witness with regard to his partnership with Dr. Langston, Langston's involvement with the tobacco industry, and Barker's opinion that it has not been proven that smoking causes lung cancer. Walters began her cross at 11:55 a.m., questioning Barker with regard to his specific causation opinion.

WITNESS: Dr. Walter L. Barker

IDENTITY: Defendants' Specific Causation Expert

EXAMINER:	DIRECT:	Robert Northrip	TIME:	0	hrs. 05	min.
	CROSS:	Marc Edell	TIME:	1	hrs. 10	min.
		Cynthia Walters	TIME:	1	hrs. 10	min.

TESTIMONY:

In his brief concluding direct, Barker testified that he questioned the claimed parallel increase in cigarette smoking and lung cancer and cited a 1956 University of Michigan autopsy study in support of his position. Barker finished by stating that he has never testified in any court proceeding before this case, never consulted with the tobacco industry on any case and never received any research funds from CTR.

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Source: https://www.industrydocuments.ucsf.edu/docs/kygb0003

Edell started his cross by immediately focusing on Barker's 25-year partnership with Langston and Barker conceded Langston had a long-standing relationship with the tobacco industry. Edell tried to suggest that Langston was too old to testify in this case and Barker was defendants' second choice. Edell used a TI draft public relations plan from the mid-1960s by Kloepfer to point out that it recited the same "inconsistencies" Barker relies on for his opinion that it has not been proven. Barker explained that these were issues he and Langston had been discussing since the early 1960s.

After suggesting that Barker had "emphatically" testified in his deposition that smoking had not been proven to cause lung cancer and he was now softening that position to say it was a risk factor, Edell tried to shift the burden by asking Barker "Have you proven that cigarette smoking does not cause lung cancer?" Barker replied "What will happen in the future may change my mind but I didn't know what caused lung cancer at the time of my deposition and I don't know now." Edell had Barker explain that doctors use differential diagnoses to rank possible diseases and then asked Barker to rank cigarette smoking and other things (e.g. lollipops) as causes of lung cancer. Barker refused and said "It is either proven or it is not proven." Barker testified that he did not think it had been proven that asbestos or arsenic caused lung cancer but he acknowledged they are risk factors. Edell said "So, nothing has been proven to you as a cause of lung cancer."

Edell had Barker admit that he was a trustee of the American College of Chest Physicians and it was that organization's position that cigarette smoking is a major cause of lung cancer, heart disease and COPD. Barker acknowledged that he was aware of that policy but he did not agree with it. He said he did not know if it reflected the views of every individual member and he noted that such policies are adopted at conventions where everyone may not be present and the vote isn't unanimous.

Edell continued along this line by showing Barker his exhibit listing all of the organizations which have concluded cigarette smoking causes lung cancer. Edell stacked several SG Reports on the table and Barker indicated he did not agree with their conclusions either. "They don't address the inconsistencies -- my questions are not answered by the reports."

Edell concluded his portion of the cross by suggesting that several surgical texts had also concluded smoking causes lung cancer but Barker insisted on being confronted with the specific articles. When Edell suggested Shields' text had such a definite conclusion, Barker disagreed and read a portion where Shields said the epidemiological studies "point to cigarette smoking as a probable cause." That same text also noted that the unknown nature of lung cancer made it difficult to identify causes. Edell said Barker does not agree with these texts, the many agencies who have taken a position or the Surgeon General. Barker replied "If you can

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solve the riddle of my inconsistencies, I would change my opinions. Until then, I am firmly committed to my position."

Walters then began her cross on specific causation. She returned to the theme of her voir dire of yesterday -- Barker had testified at his deposition that he could not make a diagnosis of cell type without viewing the pathology slides. Barker insisted that when there is disagreement among the pathologists as to the cell type, the surgeon must make the diagnosis "and certainly there is a difference of opinion and that is the basis of this case."

Walters spent the remainder of her morning cross suggesting that each of the four factors Barker relied on for his opinion of ATC (clinical, location, serotonin and appearance) were equally consistent with the small cell diagnosis. Barker insisted that no individual factor was inconsistent with small cell but the existence of all four together led to a conclusion of ATC.

ASSESSMENT:

Sarokin again commented that he thinks the defense is spending too much time on the ATC diagnosis. "I don't want two more witnesses to go over that again -- I've watched the jury and there is an occasional closing of eyes." It was explained that the additional witnesses would approach the diagnosis from different specialties but Sarokin remains skeptical.

Barker continues to appear self-confident and speaks with an authoritative voice. In fact, Sarokin had to turn the volume down on the microphone at one point. Barker is especially strong in responding to Walters' questions and frequently tells her that she is confusing terms and otherwise doesn't understand, all while politely calling her "Miss Walters."

Several lengthy sidebars were called today over Edell's and Walters' attempted use of documents during cross. Sarokin continues to try to help Walters overcome objections to the form of her questions. Despite repeated sidebar objections in the past and Sarokin's clear ruling, Edell again today connected Northrip and Sirridge with the Shook, Hardy & Bacon name.

At one point when Walters resumed questioning of Barker after a sidebar, she referred to him as "Dr. Langston."

PROJECTION:

Walters' cross could last the remainder of the afternoon. Dr. Feldman (endocrinologist) from Duke University will be the next defense witness.

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